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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1021

HANDELSVEXNOOTSCHAP NORMA N.V., and
DANK VOOR HANDEL EN SCHEEPVAART, N.V.,
Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States as Successor to the Alien Property Custodian, and

KATHRYN O'HAY GRANAHAN, Treasurer of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

HANDELSVENNOOTSCHAP NORMA, N.V., and BANK VOOR HANDEL EN SCHEEPVAART, N.V.,

Petitioners,

v.

ROBERT F. KENNEDY, Attorney General of the United States as Successor to the Alien Property Custodian, and

KATHRYN O'HAY GRANAHAN, Treasurer of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Bank voor Handel en Scheepvaart, N.V., a Rotterdam bank, and Handelsvennootschap-Norma, N.V., a wholly-owned subsidiary (presently in liquidation) of that bank, are two companies organized and existing under the laws of the Netherlands. The respondents are Robert F. Kennedy, Attorney General of the United States, as successor to the Alien Property Custodian, and Kathryn O'Hay Granahan, Treasurer of the United States.

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on January 23, 1964, affirming orders of the United States District Court, District of Columbia, which had dismissed petitioners' complaint for lack of jurisdiction.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported and is printed in Appendix A hereto, *infra*, pp. 1a-4a. The District Court rendered no opinion.

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit of January 23, 1964 was entered on January 23, 1964; p. 5a, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Are petitioners barred as enemies from bringing an action for the return of their property, seized by the Alien Property Custodian in 1946 and 1947, for the sole reason that they are Netherlands corporations and the Netherlands had been occupied by German forces during World War II?

Constitutional Provisions, Treaties and Statutes Involved

(1) U. S. Constitution, Fifth Amendment.

(2) Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956, 8 U.S.T. & O.I.A. 2043, T.I.A.S. 3942, Art. V, para. 1.

(3) Trading With the Enemy Act, 40 Stat. 411 (1917), 50 U.S.C. App. §§ 2, 5, 7, 9.

The relevant provisions of the foregoing are printed in Appendices F-H, *infra*, pp. 25a-32a. The provision on which the lower court had reached its result is section 2(a) of the Trading With the Enemy Act [hereinafter referred to as the Act] which defines the term "enemy," including in such definition

> "any individual * * * resident within the territory *(including that occupied by the military and naval forces)* of any nation with which the United States is at war * * * and any corporation incorporated within such territory of any nation with which the United States is at war * * *" [emphasis added].

Statement of the Case

Petitioners are two corporations organized and existing under the laws of the Netherlands. Petitioner Bank voor Handel en Scheepvaart N.V. is a commercial bank which was incorporated in Rotterdam in 1918. Petitioner Handelsvennootschap Normia N.V., presently in the process of liquidation, is a wholly-owned subsidiary of Bank voor Handel. Petitioners owned, directly or indirectly, various assets in the United States including bank accounts and securities.

After the German occupation of the Netherlands had ended, the Alien Property Custodian seized such assets.

In 1949, the petitioners brought actions for the return of their property in the United States District Court for the District of Columbia. The jurisdiction of that court was based on section 9(a) of the Act. The complaints (J.A. 2, 64) alleged in substance that petitioners are not enemies or allies of an enemy; that they were never engaged in activities inimical to the United States nor served as a cloak for an enemy; that notwithstanding petitioners' eligibility under the Act, respondents refused to return their property; and that petitioners were thus deprived of their property without due process of law and in violation of the Fifth Amendment to the Constitution of the United States. The relief requested was a judgment for the return of the property or just compensation therefor.

The respondents moved to dismiss the complaints on the ground of lack of jurisdiction over the subject matter because the Netherlands companies were

> "at all material times corporations incorporated in the Netherlands while the Netherlands were occupied by Germany and Germany was at war with the United States in World War II" (J.A. 72, 73).

The District Court granted this motion without opinion.

The appellate jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291.

The Court of Appeals affirmed the District Court decision, relying on *N.V. Handelsmaatschappij De Maas v. Kennedy*, 299 F. 2d 923 (D. C. Cir.), *cert. denied*, 370 U. S. 940 (1962), which had held that Netherlands corporations are

enemies and therefore not entitled to bring an action for the return of property vested under the Act.

Petitioners now seek a final opportunity to establish in an American court that they were never owned or controlled by an enemy.

Reasons for Granting the Writ

On the authority of its prior decision in *N.V. Handelsmaatschappij La Mola v. Kennedy*, 299 F. 2d 923 (D.C. Cir.), *cert. denied*, 370 U. S. 940 (1962), the court below held that petitioners are disqualified from bringing suit for the return of their property vested by the United States after World War II, because the wartime occupation of the Netherlands by Germany classed petitioners as enemies.

The result reached by the Court of Appeals for the District of Columbia Circuit barring Netherlands residents and corporations from access to court is in direct conflict with the federal decisions[1] in other Circuits[2] and

1. Willenbrock v. Rogers, 255 F. 2d 230 (3d Cir. 1958); Holland-American Merchants Corp. v. Kennedy (unreported), Civil No. 129-5, S. D. N. Y. Dec. 14, 1962.

2. Even in the District of Columbia Circuit, the judges were not unanimous. The District Court in Kennedy v. Rommel, 301 F. 2d 544 (D. C. Cir. 1962), and Kennedy v. Christiana-Onken, 301 F. 2d 54 (D. C. Cir. 1962), two cases in which the Court of Appeals followed *La Mola*, had held that nationals of formerly enemy-occupied countries could sue under §9(a). On appeal, Miller, J. indicated his disagreement with the *La Mola* holding in a concurring opinion. At the hearing of the instant case, Matthews, J. of the District Court indicated that but for *La Mola*, she felt inclined to rule in favor of petitioners. None of these cases refer to Bank of the Philippine Islands v. Rogers, 281 F. 2d 12 (D. C. Cir. 1959), *cert. denied*, 364 U. S. 927 (1960), in which the Court of Appeals had permitted a Philippine corporation to bring an action under §9(a).

the state cases on the point,[3] and is contrary to the rulings of the courts of England deciding under a similar statute.[4]

While this Court has never passed on the issue here presented with respect to the Netherlands, the opinion below is in conflict with the Constitutional principles which the Court has ruled apply in the area of enemy property legislation. As stated by Mr. Justice Harlan in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, at 214 (1958), with respect to a Swiss company:[5]

> "Past decisions of this Court emphasize that this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the Due Process and Just Compensation Clauses of the Fifth Amendment only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure."

In the instant case the Court of Appeals said:

> "The situation as a whole is not one which we think calls upon the courts, in order to avoid a possible constitutional difficulty, to define 'enemy,' as used in Section 9(a), so as to exclude one in the status of appellants."

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3. H. P. Drewry, S.A.R.L. v. Onassis, 188 Misc. 912, 69 N. Y. S. 2d 850 (Sup. Ct. 1947), *aff'd*. 272 App. Div. 870, 72 N. Y. S. 2d 263 (1947).

4. *Compare* Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij, [1943] A.C. 203, *with* Bank voor Handel en Scheepvaart, N.V. v. Administrator of Hungarian Property, [1954] A.C. 584.

5. Citing Stoehr v. Wallace, 255 U.S. 239 (1921); Guessefeldt v. McGrath, 342 U.S. 308 (1952); cf. Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931).

It is submitted that the Court of Appeals was in error when it felt free to ignore compelling Constitutional norms of due process protection, thereby arrogating to itself an unwarranted measure of discretion.

A further conflict with principles enunciated by the Supreme Court is presented on the point of treaty interpretation. Article V of the Treaty of Friendship, Commerce and Navigation with the Netherlands,[6] which was brought to the attention of the court below, contains an unconditional guarantee of national treatment with respect to access to *courts*.[7] To hold this guarantee inapplicable in a situation for which neither the text nor the intent of the Treaty would support an exception, evidences a parochial disregard for comity and international commitments. The restriction on treaty rights implicit in the opinion below violates the rule recognized by this Court in a great number of cases[8] that treaties must be construed liberally in favor of those who claim rights under them, as well as the constructional preference in

6. Treaty of March 27, 1956, 8 U.S.T. & O.I.A. 2043, T.I.A.S. 3942.

7. A United States corporation, regardless of possible activity in the country, has the right to bring suit under § 9(a). See Standard Oil Co. v. Clark, 163 F. 2d 917 (2d Cir. 1947), *cert. denied*, 333 U. S. 873 (1948). Swiss corporations were allowed to prove in court that they were nonenemies. See Société Internationale Pour Participations Industrielles et Commerciales, v. Rogers, *supra*; Clark v. Uebersee Finanz-Korporation, A. G., 332 U. S. 480 (1947). Even nationals of enemy countries were accorded this right. Guessefeldt v. McGrath, 342 U. S. 308 (1952). In Bank of the Philippine Islands v. Rogers, 281 F. 2d 12 (D. C. Cir. 1959), *cert. denied*, 364 U. S. 927 (1960), the court below had permitted a Philippine corporation to bring a § 9(a) action despite the Japanese occupation of that country.

8. See, *e.g.*, Kolovrat v. Oregon, 366 U. S. 187 (1961); Bacardi Corp. v. Domenech, 311 U. S. 150 (1940); Geofroy v. Riggs, 133 U. S. 258 (1890); Tucker v. Alexandroff, 183 U. S. 424 (1902).

favor of compliance of Acts of Congress with international law."

The refusal of the court below to re-examine its earlier decisions left standing a line of cases[10] limited to that Circuit which ignore normal rules of construction, are contrary to Constitutional principles, and violate treaty rights and international law.[11] The holding that all Netherlands residents and corporations are barred as enemies from bringing an action for the return of confiscated property is bizarre. The policy grounds advanced for this holding are untenable.[12]

This case, one of the last pending after World War II, might be dismissed as the unfortunate aftermath of a

9. See Melekh v. United States, 299 U.S. 416, 434 (1913).

10. Apart from the instant case, *La Mola* was followed in Kennedy v. Rommel, 301 F. 2d 544 (D. C. Cir. 1962), and Kennedy v. Christiani-Onken, 301 F. 2d 546 (D. C. Cir. 1962).

11. To grant Swiss and American nationals and corporations access to court, but to deny such access to Netherlands persons and entities, is clearly discriminatory. The principal ingredient of discrimination, namely, the unreasonableness of a distinction, is evident where neutrals and even nationals of Germany were permitted to bring an action under § 9(a) of the Act, see cases cited note 6 *supra*, but petitioners were barred from access to court. Furthermore, while nationals of former enemy countries are given the right to claim indemnity for their property confiscated by the United States (see Art. 5 of the Bonn Convention, May 26, 1952, 6 U.S.T. & O.I.A. 4251, T.I.A.S. 3425), Netherlands nationals are left without such a remedy.

In a recent case this Court granted an instrumentality of the Cuban government standing in an American court, stating that "the privilege of suit has been denied only to governments at war with the United States." Banco Nacional de Cuba v. Sabbatino, 32 U.S.L. Week 4229, 4232 (U. S. March 25, 1964).

12. The opinion in *La Mola* refers to the interest of the United States in the "valuable means of supporting its own war efforts * * *." 299 F. 2d at 926. This would imply that the United States has of late developed a policy to confiscate and retain property of friendly aliens to reimburse itself for wartime losses.

complex administrative task. However, the issues presented are timely and enduring. They concern the compatibility of a court decision and a statute with minimum standards of justice. Thus, this case has a significance beyond the implications of the refusal of relief to petitioners. As Mr. Justice Black in his dissenting opinion to the denial of certiorari in *La Mafa* remarked, the decisions of the Court of Appeals of the District of Columbia Circuit "will, until reviewed here, hang as a cloud over the property rights in this country of citizens of foreign countries."[13]

This petition for a writ of certiorari exhausts the possibilities open to petitioners to seek adjudication of their claims in an unbiased American judicial hearing. It is for this Court to decide whether the United States espouses a policy of confiscating the property of allies and bars adjudication of their complaints. Petitioners, other foreign corporations, and their governments are concerned about the interpretation of the Trading With the Enemy Act, a permanent statute of present application and lasting importance, and the observance of the protective provisions of treaties of friendship, commerce and navigation.

13. 370 U. S. at 943.

CONCLUSION

This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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APPENDIX

A. Opinion of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17869

HANDELSVENNOOTSCHAP "NORMA" N.V.,

Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,

Appellees.

No. 17870

BANK VOOR HANDEL EN SCHEEPVAART, N.V.,

Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided January 23, 1964

Mr. Frederick K. Juenger, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of the court, with whom Mr. Lawrence C. Moore was on the brief, for appellants. Mr. Thomas M. Haderlein also entered an appearance for appellants.

Mr. Bruno A. Ristau, Attorney, Department of Justice, with whom Assistant Attorney General Douglas, and Mr. Morton Hollander, Attorney, Department of Justice, were on the brief, for appellees.

Before—Fahy, Burger and McGowan, Circuit Judges.

Fahy, Circuit Judge: Appellants sued in the District Court under Section 9(a) of the Trading With The Enemy Act[1] to recover from the defendants, the Attorney General of the United States, and the Treasurer of the United States, property of appellants located in the United States which had been vested in 1946 and 1947 under the Act. Appellants at all material times were and still are corporations incorporated within the Netherlands and were residents of that country while it was occupied by German military forces during World War II. The occupation ended in 1945.[2] In their complaint appellants allege that they are not "enemies" as defined in the Act and accordingly are entitled to sue under Section 9(a) of the Act for return of the property. They had filed administrative claims under Section 32 of the Act.[3] These were disallowed during the pendency of the suit in the District Court, the prosecution of which was held in abeyance awaiting outcome of the administrative proceedings. The administrative decision adverse to appellants pointed

1. 40 Stat. 419 (1917), as amended, 50 U. S. C. App. § 9(a) (Supp. IV 1959-1962).

2. The cessation of hostilities was officially proclaimed by President Truman on December 31, 1946. The state of war between the United States and Germany was officially terminated by Joint Resolution of Congress of October 19, 1951. 65 Stat. 451 (1951), 50 U. S. C. App. note preceding § 1 (1958).

3. 60 Stat. 50 (1946), as amended 50 U. S. C. App. § 32 (Supp. IV 1959-1962).

out that they were beneficially owned by a Hungarian national residing in Switzerland, who, through a general agent, had engaged in extensive wartime business operations in Germany. Appellants were found to be enemy tainted because of the enemy character of their owner.

On motion of defendants, appellees, the complaints were dismissed on the ground that since appellants were corporations incorporated and existing under the laws of the Netherlands while that country was occupied by military forces of Germany during World War II they were enemies without standing to sue under Section 9(a) of the Act. Upon the authority of our decision in *N. V. Handelsvaart La Mola* v. *Kennedy*, 112 U. S. App. D. C. 92, 299 F. 2d 923 (1962), *cert. denied*, 370 U. S. 940 (1962), relied upon by the District Court, we affirm.

We add that in our *La Mola* decision we adverted to the power to confiscate enemy property in the exercise of the war powers. We recognize that the constitutional issue raised by the vesting of enemy property in a case where there is either "enemy taint" or actual enemy status might be different from the issue posed by vesting the property of a "technical enemy" under the definition of enemy reached in our *La Mola* decision. While appellees insist that the administrative remedy provided in Section 32 solves the constitutional problem, they add that should they be mistaken nevertheless the courts should not be led to read Section 9(a) to permit the maintenance of such a suit as this. They contend that if there are constitutional doubts about the adequacy of the administrative remedy the proper way to resolve those doubts would have been the timely institution of a suit in the Court of Claims for just compensation under the Fifth Amendment, citing *Cities Service Co.* v. *McGrath*,

342 U. S. 330 (1952) and *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481 (1931).[4] We agree that the consent of the United States to be sued, as granted by Section 9(a), and the jurisdiction there conferred, are subject to the limitations contained in the section, which we must observe. One who is an "enemy," as defined in the Act, is not permitted to sue under Section 9(a), and, under *La Mola*, appellants come within the statutory definition of "enemy." The situation as a whole is not one which we think calls upon the courts, in order to avoid a possible constitutional difficulty, to define "enemy," as used in Section 9(a), so as to exclude one in the status of appellants.

Affirmed.

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4. See also the reference in the *Russian Volunteer Fleet* case, *supra* at 490 to the concurrent jurisdiction of the District Court over claims against the United States based upon the Constitution and not exceeding $10,000.

B. Judgment of the Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1963

CIVIL 1940-49
No. 17,869

HANDELSVENNOOTSCHAP "NORMA" N.V.,
Appellant,
v.
ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,
Appellees.

CIVIL 1942-49
No. 17,870

BANK VOOR HANDEL EN SCHEEPVAART, N.V.,
Appellant,
v.
ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT COLUMBIA

Before—FAHY, BURGER and MCGOWAN, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the orders of the District Court appealed from in these cases are affirmed.

Per Circuit Judge Fahy.

Dated: Jan 23 1964

C. Opinion of the Court of Appeals for the District of Columbia Circuit in *N. V. Handelsbureau La Mola v. Kennedy*, 299 F. 2d 923 (1962)

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

No. 16417.

N. V. HANDELSBUREAU LA MOLA,

Appellant,

v.

ROBERT F. KENNEDY, Attorney General of the United States, as successor to the Alien Property Custodian,

Appellee.

Argued Dec. 18, 1961.

Decided Feb. 1, 1962.

MR. DINSMORE ADAMS, New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of court, with whom Mr. Lawrence S. Lesser, Washington, D. C., was on the brief, for appellant.

MISS JOAN T. BERRY, Department of Justice, with whom Asst. Atty. Gen. William H. Orrick, Jr., David C. Acheson, U. S. Atty. and John G. Laughlin, Jr., Department of Justice, were on the brief for appellee. Messrs. Arthur R. Schor and Walter T. Nolte, Department of Justice, also entered appearances for appellee.

Before—EDGERTON, PRETTYMAN and FAHY, Circuit Judges.

FAHY, Circuit Judge.

Appellant filed suit in the District Court, relying for jurisdiction upon section 9(a) of the Trading with the Enemy Act,[1] to recover property vested under the Act by appellee's predecessor as Alien Property Custodian.[2] The property consists of assets of appellant which were on deposit in banks in the United States. By order now on appeal District Judge Walsh granted appellee's motion for summary judgment. We agree that the suit may not be maintained.

One cannot maintain a suit under section 9(a) to recover vested property unless the claimant is "not an enemy or ally of enemy," to quote the language of the section. "Enemy" is defined in section 2 of the Act as follows:[3]

> "(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory."

1. 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-40, 50 U. S. C. A. Appendix §§ 1-40.

2. The powers and functions of the Alien Property Custodian were transferred on October 15, 1946, to the Attorney General Executive Order, 9788, 3 C.F.R. 575 (1943-1948), 50 U.S.C.A. Appendix, § 6 note.

3. 40 Stat. 411 (1917), as amended, 50 U.S.C. Appendix, § 2(a); 50 U.S.C.A. Appendix, § 2(a).

This definition includes a corporation incorporated within any territory which is occupied by a nation with which the United States, at the time of the occupation, "is at war." Concededly the Netherlands was occupied by military forces of the enemy of the United States during World War II, and concededly also throughout the occupation period appellant was a corporation organized and existing by virtue of the laws of the Netherlands. Appellant accordingly acquired enemy status. It correctly points out, however, that the vesting order was not made until December 15, 1950. It contends that enemy status which bars recovery of property under section 9(a) must be determined as of the time of the vesting order, and that on December 15, 1950, the occupation had ended and hostilities had ceased, with the effect of ridding appellant of its previous enemy status.

We are not in agreement with the above contention. The war had not ended when appellant's property was vested, or until the Joint Resolution of Congress of October 19, 1951.[4] In this Resolution Congress provided that property which had been subject to vesting and seizure prior to January 1, 1947, would continue to be subject to the provisions of the Act. This included appellant's property, for during the occupation which preceded January 1, 1947, that property had clearly been subject to vesting and seizure. And it had not lost its status by the ending

4. In declaring the end of World War II Congress provided that, "notwithstanding this resolution * * * any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 * * * or which has heretofore been vested or seized under that Act * * * shall continue to be subject to the provisions of that Act * * *."

65 Stat. 451 (1951), 50 U.S.C. Appendix note preceding § 1, 50 U.S.C. Appendix note preceding § 1

of hostilities prior to January 1, 1947. Cf. Feyerabend v. McGrath, 89 U.S. App. D.C. 33, 35, 189 F. 2d 694, 696.

The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation. Property subject thereto during an occupation is available to control of the enemy in aid of its warfare against the United States and its allies. However, actual vesting might not then be possible. For example, the Custodian might not discover the property during the period of enemy occupation or, if discovered during such period, investigation might entail a considerable period of time before a determination is made that the property is owned or controlled by an enemy within the meaning of section 2 and therefore subject to seizure. Its usefulness to the enemy is not thereby obviated. Rather the contrary. Yet to immunize it because for some reason the vesting authority failed to reduce it to possession until hostilities have ceased, or the occupation ended, would leave untouched property which had been available to enemy control. Such immunization would also deprive the United States of valuable means of supporting its own war efforts. Those efforts and the heavy responsibilities consequent upon a war, persist long after hostilities have ceased and occupied countries have been freed of the enemy.

For reasons thus suggested we think that in the absence of clearer language indicating the necessity for a different construction the enemy status appellant acquired during the occupation continued, insofar as section 9(a) is concerned, to the time of the vesting order; that is, we think that at that time the end of hostilities and of the occupation of the Netherlands had not removed appellant from the technical enemy status it had acquired during the

occupation. Orme v. Northern Trust Co., 410 Ill. 354, 102 N.E. 2d 335 (1951), cert. denied, Hardenberg v. McGrath, 343 U.S. 921. If this is so then appellant was an enemy within the meaning of section 9(a) when it filed the present suit.

Stated in a different manner, the definition of enemy in section 2 of the Act, as one who is "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war" or "incorporated within such territory" is not to be construed as referring only to one who at the date of the vesting order is a resident of or chartered by a nation with which the United States "is [still] at war"; rather, it is to be construed as including a person who or corporation which, at the time of the vesting order, is one who has been a resident of an enemy occupied nation during its occupation or was then incorporated under the laws of an occupied territory and resident therein. "The word 'enemy' * * * of course refers to the person who or corporation which fulfilled the definition of an enemy during the war." Swiss Nat. Ins. Co. v. Miller, 267 U.S. 42, 45. And lending some support to the position we take is Hansen v. Brownell, 98 U.S. App. D.C. 239, 234 F.2d 60. And see Bank Voor Handel En Scheepvaart, N. V. v. Kennedy, 109 U.S. App. D.C. 391, 288 F.2d 375; cert. denied, 366 U.S. 962. Compare, however, Willenbrock v. Rogers, 255 F.2d 236, 238 (3d Cir. 1958).

It is suggested that the construction of "enemy" we adopt, and which has the result of enabling the United States to retain appellant's property without compensation, raises constitutional doubts under the Fifth Amendment. It is urged, therefore, that we should adopt a more limited construction which would preclude the confiscation of ap-

pellant's property. If, however, we are right in the reasons we have advanced in support of the construction we give the Act—that is, the efficacy of this construction in enabling the purposes of the Act to be fulfilled—then the same reasons remove the constitutional doubts. The constitutionality of confiscating enemy property in carrying out the war powers of course is not questioned.[5] A reasonable exercise of this aspect of the war powers permits the United States to reach property located within its borders which was available to or whose owner was under the control of the enemy while resident within occupied territory. To require as a constitutional matter that the property be actually vested during the occupation or before the end of hostilities would create a very substantial limitation upon the economies of warfare.

We are cited to no precedent which holds with appellant's constitutional probings in the circumstances of the present case. The case of Guessefeldt v. McGrath, 342 U. S. 308, turned on the construction to be given "resident within" Germany. While the Court points out that "friendly aliens are protected by the Fifth Amendment requirement of just compensation," citing Russian Volunteer Fleet v. United States, 282 U.S. 481, the Court found that the claimant never came within the definition of an enemy. It does not seem to us that this decision requires us to hold that one who concededly acquired, with respect to its prop-

5. Denying a person recovery of seized and vested property is not a deprivation of property without due process when the claimant is found to be an enemy. "There is no constitutional prohibition against confiscation of enemy properties." United States v. Chemical Foundation, Inc., 272 U.S. 1, 11; Stoehr v. Wallace, 255 U.S. 239, 245; Ueberseering Finanz-Korporation v. Brownell, 133 F. Supp. 615, 620 (D.D.C. 1955), aff'd sub nom. Von Opel v. Brownell, 100 U.S. App. D.C. 341, 244 F. 2d 789, cert. denied, 355 U.S. 878. And see Cummings v. Deutsche Bank, 300 U.S. 115, 120-121.

erty, enemy status during the enemy occupation of the Netherlands, under whose laws it was then incorporated, lost that status, with respect to its property, because the property was not vested while the occupation continued. This would be inconsistent with the purposes of the Act as gathered from its own text and with the congressional intention as expressed in the Joint Resolution of October 19, 1951.

The only reliance for consent of the United States to be sued in this case is section 9(a) of the Act. Schilling *v.* Rogers, 363 U. S. 666; Bank Voor Handel En Scheepvaart, N. V. *v.* Kennedy, supra; Tiedemann *v.* Brownell, 96 U. S. App. D.C. 9, 222 F.2d 802. Since that section does not cover the case, and this suit is in substance, though not in name, one against the United States to which it has not consented, the District Court properly awarded judgment for appellee. See Bank Voor Handel En Scheepvaart, N. V. *v.* Kennedy, supra. It goes without saying that this carries no possible implication of unfriendliness to the Netherlands. It rests solely on a technical enemy status acquired by appellant under the Trading with the Enemy Act by reason of the enemy occupation of the Netherlands and appellant's incorporation therein.

A further matter is noted. Before filing the instant suit in the District Court under section 9(a) appellant had applied to the Attorney General under the provisions of section 32(a)[6] of the Act for discretionary administrative relief permitted by that section to technical enemies who could not qualify to sue under section 9(a). In response to the application appellee's predecessor advised appellant in writing as follows:

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[6] 60 Stat. 50 (1946), as amended, 50 U.S.C. Appendix, § 32(a), 50 U.S.C.A. Appendix, § 32(a).

"Enclosed is the Order disallowing the above-numbered claim.

"For your information, it is the present practice of this Office, except in cases where a claim is clearly entitled to allowance, to remit the claimant whose right to sue is not barred by lapse of time to his remedy in court and thus avoid the possible delay and expense of a double set of hearings." Such procedure is authorized by an amendment to the Rules of Procedure for Claims of this Office, effective April 16, 1957. * * *

"Under the provisions of Section 33 of the Trading with the Enemy Act * * * a timely suit may be instituted under Section 9(a) of the Act for return of the property claimed in the event you are dissatisfied with the administrative action taken on your claim, and the enclosed order of disallowance does not prejudice in any way your right to sue."

On the basis of the foregoing appellant contends that the Government may not in equity and good conscience claim that appellant is ineligible to sue under section 9(a) for any reason other than one which would render it ineligible as a claimant under section 32(a). But the question before the District Court was one of jurisdiction. Whatever relief, if any, appellant may seek on the basis of the previous disallowance of its application under section 32(a), the District Court was without jurisdiction of the complaint in the present case. In this situation we remand for dismissal of the complaint. Schilling *v.* Rogers, supra; Tiedemann *v.* Brownell, supra.

It is so ordered.

D. Dissenting Opinion of Mr. Justice Black from the Denial of a Petition for a Writ of Certiorari in *N. V. Handelsbureau La Mola* v. *Kennedy*, 370 U. S. 940 (1962)

COURT OF APPEALS.

DISTRICT OF COLUMBIA CIRCUIT

No. 907.

N. V. HANDELSBUREAU LA MOLA,

Petitioner,

v.

ROBERT F. KENNEDY,
Attorney General of the United States, etc.

June 25, 1962. Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. Mr. Justice Black dissents:

The Trading With the Enemy Act[1] authorizes the Government to seize and confiscate under some circumstances the property of aliens. By its denial of certiorari in this case the Court leaves standing a judgment of confiscation[2] under circumstances which in my judgment the Act does not authorize. I therefore feel impelled to dissent.

In May 1940 Hitler's forces violating the historic neutrality of the Netherlands, suddenly invaded that coun-

1. 40 Stat. 411, as amended, 50 U.S.C. App. § 1 et seq.
2. 112 App. D.C. 92, 299 F.2d 923.

try, largely destroyed one of its finest cities and within a short time occupied the whole country. Although the United States soon recognized and allied itself with a group of Royal Netherlands citizens who had escaped and set up an independent government-in-exile in London, that occupation continued until May 1945 when troops from this country and its allies finally managed to liberate the Netherlands from the German forces.[3] Within several weeks this country's ally, the free Netherlands government, assumed lawful command of its own citizens and territory. It was not, however, until some five and a half years later, long after the end of the Nazi occupation and the return of the lawful government of the Netherlands, that the Alien Property Custodian in 1951, purportedly acting under the Trading With the Enemy Act, seized and confiscated the four bank accounts in this country belonging to the petitioning Dutch company which form the object of this lawsuit. That confiscation of petitioner's property was sustained by the Court of Appeals on the sole ground that the Netherlands, our friend and ally, where petitioner was incorporated, had been overrun and occupied by Germany during the war. Because this result seems so contrary to the Purpose of Congress in passing the Trading With the Enemy Act and raises such grave constitutional questions under the Fifth Amendment's command that the Government not take private property without paying just compensation, I think we should grant certiorari to review the Court of Appeals decision.

The Trading With the Enemy Act provides that the President may seize "During the time of war" "any

3 See Mutual Aid Agreement between the United States and the Netherlands, July 8, 1942, 56 Stat. 1554; and Mutual Aid Agreement, April 30, 1945, 59 Stat. 1627.

property in which any foreign country or a national thereof has any interest." That Act also provides, however, that "Any person not an enemy or ally of enemy" may sue to compel the return of his property. And even though the Act defines an "enemy" as "Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war * * * and any corporation incorporated within such territory * * *," it does not say, as did the Court of Appeals, that every corporation which was at any time present within territory while that territory was occupied by an enemy is an "enemy" within the meaning of the Act. I do not see how it can be thought that Congress intended by this Act to authorize the confiscation, between the end of actual occupation in 1945 and the official end of the war in 1951,[4] of every bit of property in this country owned by the citizens and corporations of the Netherlands, France, Norway, Belgium and other countries solely because those countries, our staunch friends and allies, had during the war been overrun by an enemy that was trying to destroy them and us.[5] I can understand how Congress might be thought to have desired to authorize the President to seize the property of citizens and corporations of friendly countries and allies when those countries were at the time being occupied by an enemy which might be able to use their property to carry on war against us. I do not believe, however, that Congress intended to place a permanent

4. Joint Resolution to terminate the state of war between the United States and the Government of Germany, October 19, 1951, 65 Stat. 451.

5. Cf. Willenbrock v. Rogers, 255 F2d 230.

taint on the property of our friends so that whenever that property showed up in this country it might be seized—even though long after our friends' countries had been fortunate enough to escape the occupation clutches of our common enemy. It would be bad enough after the end of occupation to confiscate the property of friendly aliens which had been in this country during the occupation but to go beyond that and confiscate as here a bank account which did not even exist in this country until 1948, three years after the return of lawful government to the Netherlands, seems wholly contrary to any purpose Congress could have had in the Act. Moreover, to construe this statute this way raises serious questions about the constitutionality of the Act as applied, for it has long been settled that the provision of the Fifth Amendment requiring the payment of just compensation when private property is taken for public use protects friendly aliens as well as citizens.[6] And it is obviously no answer to this to say, as did the Court of Appeals, that the confiscation was proper because this Government needed the property after the war to support the cost of its past war efforts. Our constitutional guarantee against uncompensated government seizure of private property surely does not melt away merely because public officials believe the Government needs to seize property without paying for it.

This case would of course be far different if the Court of Appeals had rested on the two other grounds urged by the Government below: (1) that petitioner was "enemy-tainted," (2) and also that it was engaged in doing business in Germany which was enemy territory. But

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6. Russian Volunteer Fleet v. United States, 282 U. S. 481, 489-492.

the Court of Appeals did not rest on either of these grounds and we must accept the case as it comes to us or fail to accord petitioner its full day in court. This is particularly true here, since the question of enemy domination, if litigated, would have to be decided in light of Kaufman v. Societe Internationale Pour Participations Industrielles et Commerciales,[7] where we held that innocent stockholders even of enemy corporations must be protected from having their property confiscated.

It is true that the refusal of the Court to grant certiorari in this case gives no express approval to the interpretation of the Act made by the Court of Appeals and leaves that question open for final authoritative decision later. The Court's refusal to act now, however, does leave standing the Court of Appeals' decision as a precedent in the lower federal courts which will until reviewed here hang as a cloud over the property rights in this country of citizens of foreign countries.

Same case below, 112 App DC 92, 299 F2d 923.

Lawrence S. Lesser and Dinsmore Adams for petitioner.

Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr. and Pauline B. Heller for respondent.

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7. 343 U S 156, 96 L ed 853, 72 S Ct 611

E. Opinion of the District Court, Southern District of New York in *Holland American Merchants Corp.* v. *Kennedy* (unreported)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CIV. 129-5

HOLLAND AMERICAN MERCHANTS CORPORATION,

Plaintiff,

against

ROBERT F. KENNEDY, Attorney General as successor to the Alien Property Custodian,

Defendant.

MEMORANDUM

MURPHY, D.J.:

These are cross motions for summary judgment in an action brought under the Trading with the Enemy Act, 50 U.S.C. App. Sections 1-40, to recover $43,640.68 vested by defendant's predecessor, the Alien Property Custodian in April, 1947.

The Attorney General premises his motion on the claim that plaintiff is an "enemy" within the meaning of the Trading with the Enemy Act, and thus is ineligible to sue under Section 9(a). Plaintiff disputes this and claims that no enmity can be attributed to it under the "enemy taint" doctrine and further on the ground that there is no triable issue of fact on the issue of ownership of the $43,640.68.

Defendant relies on very few facts, which plaintiff does not dispute, viz., (1) that plaintiff is a Delaware corporation; (2) since its incorporation in October, 1940, until 1954 it was a wholly owned subsidiary of Koopmansbank, a Dutch corporation; (3) on August 30, 1939, "and at various times thereafter" Koopmansbank with its principal place of business in Amsterdam, Holland, conducted business in Holland; (4) Koopmansbank acquired 548 shares of Ozalid Corporation from Kalle & Co., a German company, on August 30, 1939; (5) that the amount in issue represents the profit which Koopmansbank made from selling 548 shares of Ozalid Corporation on June 26, 1940, pursuant to treasury license, and (6) that in November, 1940, Koopmansbank transferred this amount to plaintiff's account as part of the consideration Koopmansbank paid to plaintiff for the issuance to it of all of plaintiff's capital stock also pursuant to treasury licenses.

Plaintiff, as we said, does not controvert these facts but adds many more which in turn are not controverted by defendant. For example, prior to the occupation of Holland by Germany on May 19, 1940, the managing director of Koopmansbank had sailed from Europe to New York where on June 26, 1940, he sold the Ozalid shares to General Aniline & Film Corporation. Thereafter and on July 2, 1940, pursuant to Dutch law he incorporated and domiciled Koopmansbank in Curacao in the Netherlands West Indies, where it remained until 1947. In October, 1940, Koopmansbank caused the incorporation of plaintiff in Delaware and transferred $453,040.08 (the profit on the sale of the Ozalid stock) to plaintiff's account in exchange for all of plaintiff's stock. The balance of $54,000 was deposited in Koopmansbank as a credit against the original purchase price. This sum was sub-

sequently vested from Koopmansbank account as the property of Kalle & Co. Plaintiff has never made any claim against it. Its present claim was disallowed without a hearing by the office of Alien Property Custodian in October, 1957.

It is plaintiff's argument that on December 12, 1941, the day Germany became a country with which the United States was at war, plaintiff was owned by a corporation incorporated and domiciled in the Dutch West Indies, a portion of the Netherlands never occupied by Germany or any other country at war with the United States.

Defendant's argument is that plaintiff, a wholly owned American subsidiary of a Dutch corporation (Koopmansbank) is an "enemy" of the United States because Koopmansbank was incorporated in and doing business in enemy occupied territory throughout World War II. Accordingly plaintiff could not acquire by transfer an interest in the disputed property which would preclude the United States vesting the same as enemy property on the outbreak of war between Germany and the United States on December 12, 1941.

Obviously plaintiff is not in itself an enemy under the definition of enemy in Section 2(a). The principal point in dispute is whether it is an enemy under the "enemy taint" doctrine. Defendant claims that although the enemy taint doctrine was rejected in Bolin, Meyer & Co. v. Miller, 266 U. S. 457, (1925), it was subsequently adopted after the amendment of 5(b) in 1941 by the Supreme Court in Clark v. Uebersee Finance Corp., 332 U. S. 480 (1947) and that corporations infected with an enemy taint are now within the reach of the term enemy. It also relies on two decisions of the Court of Appeals for the District of Columbia, Bank Voor Handel En Scheepvaart, N.V.

v. Kennedy, 288 F. 2d 375 (1961) cert. denied, 366 U. S. 962 (1961) and N. V. Handelsbureau La Mola v. Kennedy, 299 F. 2d 823 (1962).

Defendant's argument is unsound and the cases relied upon do not support his theory.

It is undisputed that from July 2, 1940, until March, 1947, Koopmansbank was domiciled in the Netherlands West Indies. This was pursuant to Netherlands' law, which is not disputed, and it was physically outside continental Holland on December 12, 1941, the day Germany became a country with which the United States was at war through May 4, 1945, when continental Holland ceased to be "territory occupied by the military and naval forces" of such a country. In the *Handelsbureau La Mola* and *Bank Voor Handel*, supra, cases there is no allegation or statement to the effect that either plaintiff had transferred its domicile to unoccupied territory but rather the admitted fact was that each had been incorporated in the Netherlands during the German occupation.

Defendant assumes, pursuant to the pretrial stipulation, that Koopmansbank did business in continental Holland during the German occupation, but there is no support for that in the stipulation since it merely says that it did business in Amsterdam, Holland, on August 30, 1939, and "at various times thereafter." In addition there is no claim or any facts submitted that plaintiff was doing business in Holland during the German occupation, or had a branch or agency there.

Even if Koopmansbank can be considered an enemy during the time of the German occupation of continental Holland, "enmity" must be determined as of the date of vesting. Here the vesting was on April 24, 1947. Although Sections 9(a), 7(b) and 2(a) do not state when

enmity is to be determined they all refer to the present tense, and we think that a fair construction of the statute is that enmity must be determined as of the date of vesting and agree with Judge Goodrich in Willenbrock v. Rogers, 255 F. 2d 236, 238 (3d Cir., 1958).

This holding eliminates the necessity of considering plaintiff's further argument that the Treaty of Friendship, Commerce and Navigation between the United States and the Netherlands, 8 U.S.T. 2043, T.I.A.S. 3942 (1927) would be violated if we were to hold that Koopmansbank was an enemy.

Accordingly we deny defendant's motion and hold that plaintiff may sue.

However, plaintiff's motion on the merits must be denied because there is an issue of fact, albeit a thin one. Whether Kalle & Co. had an interest in the profits, the subject matter of this action, is one that must await trial. The exhibits submitted by defendant as opposed to the affidavits and exhibits submitted by plaintiff raise at least a suspicion that the property in question might very well be German property. Was it a "cloaking transaction" whereby Kalle & Co. hid its beneficial ownership of the Ozalid shares in order to protect them from seizure in the event of war? The circumstances on the date of sale are important; the price paid and the possibility of some secret understanding are all matters that must be resolved at a plenary trial. The Supreme Court has recently said that the slightest issue of fact is enough to defeat a motion for summary judgment. It may be, to paraphrase the Supreme Court in Poller v. C.B.S., 368 U. S. 464, 472 (1962), that upon all the evidence a jury would be with a plaintiff. But we cannot say on this rec-

ord that "it is quite clear what the truth is." Cf. Fountain v. Filson, 336 U. S. 681 (1949).

These are orders. No settlements are necessary.

THOS. F. MURPHY

U. S. D. J.

Dated, New York, N. Y., December 14, 1962.

F. United States Constitution Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

G. Trading With Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 1-43

Section 2(a) *Definitions*.

The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act (Sections 1-6 and 7-39 of this Appendix)—

(1) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war, or incorporated within any country other than the United States and doing business within such territory.

(2) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy."

The words "ally of enemy," as used herein shall be deemed to mean—

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation which is an ally of a nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of such ally nation, or incorporated within any country other than the United States and doing business within such territory.

(b) The government of any nation which is an ally of a nation with which the United States is at war, or any political or municipal subdivision of such ally nation, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war, other than citizens of the United States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy."

The word "person," as used herein, shall be deemed to mean an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic.

The words "United States," as used herein, shall be deemed to mean all land and water, continental or insular, in any way within the jurisdiction of the United States or occupied by the military or naval forces thereof.

The words "the beginning of the war" as used herein, shall be deemed to mean midnight ending the day on which Congress has declared or shall declare war or the existence of a state of war.

The words "end of the war," as used herein, shall be deemed to mean the date of proclamation or exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date, in which case the date so proclaimed shall be deemed to be the "end of the war" within the meaning of this Act [Sections 1-6 and 7-39 of this Appendix].

The words "bank or banks," as used herein, shall be deemed to mean and include national banks, State banks, trust companies, or other banks or banking associations doing business under the laws of the United States, or of any State of the United States.

The words "to trade," as used herein, shall be deemed to mean—

(a) Pay, satisfy, compromise, or give security for the payment, or satisfaction of any debt or obligation.

(b) Draw, accept, pay, present for acceptance or payment, or indorse any negotiable instrument or chose in action.

(c) Enter into, carry on, complete, or perform any contract, agreement, or obligation.

(d) Buy or sell, loan or extend credit, trade in, deal with, exchange, transmit, transfer, assign or otherwise dispose of, or receive any form of property.

(e) To have any form of business or commercial communication or intercourse with.

SECTION 9.

Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover; sale of claimed property in time of war or during national emergency

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person

from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district courts of the United States for the district in which such claimant resides, or if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 and 41-44 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States in order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further*, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the

United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant would have received had he elected to accept his proportionate part of the

net proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

H. Treaty of Friendship, Commerce and Navigation With the Netherlands, March 27, 1956, 8 U. S. T. & O.I.A. 2043, T.I.A.S. 3942

ARTICLE V

1. Nationals and companies of either Party shall be accorded national treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without any requirement of registration or domestication.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1021

HANDELSVENNOOTSCHAP NORMA N.V., ET AL.,
PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The instant petition raises the same question which was presented in *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A.D.C.), certiorari denied, 370 U.S. 940—whether a Netherlands corporation, which admittedly was an "enemy" under Section 2(a) of the Trading With the Enemy Act during hostilities and the German occupation of the Netherlands, continued to be an "enemy" after the occupation terminated, and is therefore precluded from maintaining an action under Section 9(a) of the Act for return of property vested by the United States in 1946 and 1947.

731-285—64

Petitioners are Netherlands corporations which were resident and doing business in enemy-occupied Holland during World War II (J.A. 2, 64).[1] The bulk of their property in the United States was vested by the Alien Property Custodian as enemy property during the German occupation of Holland (J.A. 55–62); the remainder was vested after the termination of actual hostilities (J.A. 83–92) but before the ending of the state of war. Only these so-called "late" vestings are in issue in the present actions.[2]

Although the present suits were instituted in 1949 (Bank voor Handel, J.A. 2–8; Norma, J.A. 64–69), they were stayed pending disposition of administrative claims for return of the vested property which were filed with the Alien Property Custodian pursuant to Section 32 of the Trading With the Enemy Act, 50 U.S.C. App. 32 (J.A. 25–26). The administrative claims were disallowed on February 13, 1959, by the Office of Alien Property, which ruled that petitioners were beneficially owned by a Hungarian national residing in Switzerland, Baron Heinrich Thyssen-Bornemisza; that Thyssen-Bornemisza, acting through a general agent, had engaged in extensive wartime business operations in Germany; and that

[1] Citation is to the Joint Appendix in the court of appeals which has been filed with the Clerk of this Court.

[2] The vestings during World War II were subject to a prior suit, *sub nom. Bank voor Handel en Scheepvaart, N.V.* v. *Kennedy*, 288 F. 2d 375 (C.A.D.C.), certiorari denied, 366 U.S. 962. The late vestings are expressly authorized by the congressional resolution terminating the state of war between the United States and Germany. 65 Stat. 451, 50 U.S.C. App. note preceding § 1.

petitioners were "enemy-tainted" because of the enemy character of their owner. This administrative determination is final and non-reviewable. *Schilling v. Rogers*, 363 U.S. 666.

Having failed in the administrative proceedings, petitioners pursued their suits under Section 9(a) of the Trading With the Enemy Act, 50 U.S.C. App. 9(a), which authorizes the district courts to entertain proceedings for the return of property vested after the termination of hostilities.[2] Section 9(a), however, permits suit only by persons who are not enemies or allies of enemies.[3] The term "enemy," in turn, is defined in Section 2(a), 50 U.S.C. App. 2(a), to include a person or corporation of any nationality "resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war," and a corporation organized or doing business "within such territory." Upon the authority of its decision in *La Mola*, the court below held that petitioners were enemies under the Act and therefore without standing to sue under Section 9(a). Accordingly, it affirmed the judgment of the district court dismissing the complaint. There is no cause for further review of the issue which this Court declined to review only two Terms ago.

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[1] The administrative decision is reprinted in Appendix B to the government's brief in *Bank voor Handel en Scheepvaart, N.V. v. Kennedy*, No. 958, October Term, 1960.

[2] Those without standing to sue in court may pursue an administrative remedy under Section 32 of the Act. As noted, petitioners have pursued this remedy to a final decision that they are enemy-tainted and therefore not entitled to the return of their property.

Faced with these unequivocal statutory provisions and a settled line of decisions applying them in accordance with their plain terms,[5] petitioners urge (Pet. 6–7) that the statute is unconstitutional if deemed to preclude, after a state of war has been officially terminated, a judicial action to recover property vested after enemy occupation had ceased, where the pre-vesting owner was merely a "technical enemy"—*i.e.*, an "enemy" by virtue of enemy occupation of the territory in which he resided. The very same contention has been raised and rejected in a number of previous cases in which the Court has denied petitions for review.[6]

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[5] See *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A.D.C.), certiorari denied, 370 U.S. 940; *Bank Voor Handel En Scheepvaart, N.V.* v. *Kennedy*, 288 F. 2d 375 (C.A.D.C.), certiorari denied, 366 U.S. 962; *Kennedy* v. *Christiani-Onken*, 301 F. 2d 546 (C.A.D.C.), certiorari denied, 371 U.S. 828; *Kennedy* v. *Rommel and DeCourten*, 301 F. 2d 544 (C.A.D.C.), certiorari dismissed, 371 U.S. 882; *Hansen* v. *Brownell*, 234 F. 2d 60 (C.A.D.C.). Cf. *Schrijver* v. *Sutherland*, 19 F. 2d 688 (C.A.D.C.), certiorari denied, 275 U.S. 546. But see *Willenbrock* v. *Rogers*, 255 F. 2d 236 (C.A. 3).

[6] *E.g.*, *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (C.A.D.C.), certiorari denied, 370 U.S. 940; *Kennedy* v. *Rommel and DeCourten*, 301 F. 2d 544 (C.A.D.C.), certiorari denied, 371 U.S. 882; *Kennedy* v. *Christiani-Onken*, 301 F. 2d 546 (C.A.D.C.), certiorari denied, 371 U.S. 828.

As pointed out in our brief in opposition in *La Mola* (No. 907, Oct. Term 1961, pp. 12–14), even if the statutory remedy should be deemed constitutionally inadequate, the conclusion is not that Section 9(a) may be rewritten to give petitioners a right to sue in the district court, but, rather, that petitioners should have proceeded in the Court of Claims by way of suit for just compensation based upon the Fifth Amendment. See *Cities Service Co.* v. *McGrath*, 342 U.S. 330, 335; *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 479–480; *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481.

Petitioners suggest (Pet. 6) that the "Constitutional principles" which the Court stated in the *Interhandel* case (*Societe Internationale* v. *Rogers*, 357 U.S. 197) require that they be afforded a judicial determination of the propriety of the seizure of their property. No such rule was laid down in *Interhandel*. That case did not involve a company which was an "enemy" by definition. It turned on the power of the federal courts to enforce discovery orders under the Federal Rules of Civil Procedure. Past decisions establish that denying a person recovery of vested property is not a deprivation of property without due process when the claimant is found to be an enemy. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11; *Stoehr* v. *Wallace*, 255 U.S. 239, 245. *A fortiori*, one who admittedly falls within the definition of an "enemy" is not denied due process by being given an exclusive administrative remedy.

2. Petitioners' alternate contention is equally without merit. It is urged that Article V of the 1956 Treaty of Friendship, Commerce and Navigation with the Netherlands[1] guarantees to Netherlands companies the same access to United States courts as is enjoyed by United States companies. In essence, petitioners contend that the treaty, *pro tanto*, amends the Trading With the Enemy Act so as to permit Netherlands citizens access to the courts even if found to be enemies. This very interpretation of the treaty was repeatedly urged through diplomatic channels and rejected by the Department of State; it was raised in *Bank voor Handel en Scheepvaart, N.V.* v. *Ken-*

[1] T.I.A.S. 3942, 8 U.S.T. 2043.

nedy, supra, 288 F. 2d at 376, and rejected; and it was reiterated without success in the petition for certiorari in that case, both by the petitioner and by the Ambassador of the Netherlands (No. 958, October Term, 1960).

In sum, the questions presented here have repeatedly been decided adversely to the position urged by the petitioners. They are of no public importance at this late stage in the administration of the alien property program. Accordingly, there is no occasion for further review.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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PETITIONERS' BRIEF IN REPLY TO RESPONDENTS' OPPOSITION

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Respondents, on pages 2 and 3 of their brief, refer to the disallowance of petitioners' claim by the Office of Alien Property. This matter is not part of the record in this case and wholly irrelevant to its determination. Its introduction is an attempt to prejudice petitioners by insinuating that they have already been granted an impartial hearing on the issue of true enemy status. This petitioners categorically deny. The very facts which respondents assume as the basis for enemy taint—"engaging in

extensive wartime operations in Germany"—(Respondents' Brief page 2)—are the ones petitioners urge be determined by an American tribunal. So far, petitioners have not been granted due process. All they have obtained is an administrative hearing before the confiscating agency. That agency, despite the fact that the proceedings were based entirely on stipulated facts and issues exacted from petitioners, took ten years to render a decision which was as wrong, as a matter of law, and as untenable, as a matter of common sense, as the instant assertion that Netherlands companies are enemies.

The instant petition relates to an action under section 9(a), which is the sole and exclusive remedy provided by the Trading With The Enemy Act. This action is not one for review of the administrative determination made under section 32(a). Nor does the earlier extra-judicial proceeding bind this Court in any manner, or render the necessity for review of the lower court's opinion less urgent.

CONCLUSION

Petitioners' cause is meritorious. This is the last opportunity to settle it in an American court. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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